Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 74-54

TRANSAMERICAN FREIGHT LINES, INC.,
Petitioner,

vs.

BRADA MILLER FREIGHT SYSTEMS, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. .....

SANDRA WEAR,

vs.

BRADA MILLER FREIGHT SYSTEMS, INC.,
Respondent,

and

TRANSAMERICAN FREIGHT LINES, INC.,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

Transamerican Freight Lines, Inc. hereby petitions this Court to grant it a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit entered May 6, 1974 in this cause, on the ground that this decision is in direct conflict with the decisions rendered by the United States Courts of Appeals for the Fifth Circuit and

for the Fourth Circuit and on the grounds that the decision of the Seventh Circuit in this case erroneously interprets and construes certain sections of the Interstate Commerce Act and certain regulations of the Interstate Commerce Commission.

OPINIONS BELOW

The opinion of the District Court for the Southern District of Illinois, Southern Division, in *Sandra Wear v. Brada Miller Freight Systems, Inc., and Transamerican Freight Lines, Inc.*, Civil Action number 4289, is not reported. A true copy of the same and of the order of that Court entered in conjunction with its opinion are appended hereto as Appendix A. The opinion of the United States Court of Appeals for the Seventh Circuit in *Sandra Wear v. Transamerican Freight Lines, Inc., Defendant-Appellant and Brada Miller Freight Systems, Inc., Defendant-Appellee*, number 73-1773, is not yet reported. A true copy of that opinion is appended hereto as Appendix B. The opinion of the United States Court of Appeals for the Fifth Circuit in *Allstate Insurance Company v. Alterman Transport Lines, Inc.* is reported at 465 F. 2nd 710. A true copy of this opinion is appended hereto as Appendix C. The opinion of the United States Court of Appeals for the Fourth Circuit in *Carolina Freight Carriers Corporation v. Pitt County Transportation Company* is reported at 492 F. 2nd 243. A true copy of this opinion is appended hereto as Appendix D.

JURISDICTION

Transamerican Freight Lines, Inc. appealed this case to the United States Court of Appeals for the Seventh Circuit from an order of the District Court granting a motion for Summary Judgment to Brada Miller Freight Systems, Inc. on Transamerican's cross-claim against Brada. It is the decision of the Court

of Appeals affirming the District Courts' order granting summary judgment which is sought to be reviewed here. That decision was entered in the case of *Sandra Wear v. Brada Miller Freight Systems, Inc. et al.*, on May 6, 1974, by the United States Court of Appeals for the Seventh Circuit. This petition is being filed within ninety (90) days of the entry of such judgment pursuant to 28 U.S.C. § 2101(c).

The jurisdiction of this Court to review the judgment and decision in this case by writ of certiorari is conferred by 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

In a case involving an agreement between two carriers for the lease of a tractor and trailer from one carrier to the other for a single trip, where the lease complies with the I.C.C. regulations and where the lessee assumes control and responsibility for the tractor and trailer involved according to I.C.C. regulations, is an indemnity clause in this otherwise valid lease invalid as against public policy and in circumvention of the I.C.C. regulations as held by the United States Court of Appeals for the Seventh Circuit in its opinion in *Sandra Wear v. Brada Miller Freight Systems, Inc. et al.*, not yet reported, or is this indemnity clause a valid exercise of the right of the parties to freedom of contract as held by the United States Court of Appeals for the Fifth Circuit in the case of *Allstate Insurance Company v. Alterman Transport Lines, Inc.*, 465 F. 2nd 710, and as held by the United States Court of Appeals for the Fourth Circuit in the case of *Carolina Freight Carriers Corporation v. Pitt County Transportation Company*, 492 F. 2nd 243.

STATUTES AND REGULATIONS INVOLVED

Statutes:

Interstate Commerce Act:

Section 304(e), 49 U.S.C. § 304(e):

(e) Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property—

(1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment.

Vol. 10, United States Code (1970 ed.), pp. 11942.

Regulations:

Interstate Commerce Commission Regulations:

Section 1057.3(a), 49 C.F.R. § 1057.3(a):

The provisions of § 1057.4, except paragraphs (c) and (d), relative to inspection and identification of equipment, shall not apply:

(a) *Equipment used in the direction of a point which lessor is authorized to serve.* To equipment owned or held under a lease of 30 days or more by an authorized carrier and regularly used by it in the service authorized, and leased by it to another authorized carrier for transportation in the direction of a point which lessor is authorized to serve: *Provided,* That the two carriers have first agreed in writing that control and responsibility for the operation of the equipment shall be that of the lessee from the time the equipment passes the inspection required to be made by lessee or its representative under § 1057.4(c) until such time as the lessor or its representative shall give to the lessee or its representative a receipt specifically identifying the equipment and stating the date and the time of day possession thereof is retaken or until such time as the required inspection is completed by another authorized carrier taking possession of the equipment in an interchange of equipment where such use is contemplated, such writing to be signed by the parties or their duly authorized regular employees or agents, and a copy thereof carried in the equipment while the equipment is in the possession of the lessee.

Title 49, Code of Federal Regulations, Chapter 10, Part 1057, Volume effective 10-1-73, Published by Office of Federal Register, G.S.A. pp. 138.

Section 1057.4(a)(4), 49 C.F.R. § 1057.4(a)(4):

Other than equipment exchanged between motor common carriers in interchange service as defined in § 1057.5, authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

(a) *Contract requirements.* The contract, lease, or other arrangement for the use of such equipment:

(4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except: (exceptions not pertinent.)

Title 49, Code of Federal Regulations, Chapter 10, Part 1057, Volume effective 10-1-73, Published by Office of Federal Register, G.S.A. pp. 138 and 139.

STATEMENT OF THE CASE

This case was originally instituted by Sandra Wear to recover damages for injuries she received in a truck-car collision on January 22, 1968. She filed her action against Brada Miller Freight Systems, Inc. (hereafter Brada), and Transamerican Freight Lines, Inc. (hereafter Transamerican), which defendants then cross-claimed against each other. Ultimately plaintiff dismissed her case against Brada and proceeded to trial against Transamerican during the course of which trial plaintiff and Transamerican effectuated a settlement of plaintiff's case. Thereafter Transamerican amended its cross-claim against Brada to plead the settlement and by the cross-claim sought recovery from Brada of the amount of the settlement plus expenses by virtue of an indemnification clause in a truck lease agreement between Brada (lessor) and Transamerican (lessee).

The District Court granted Brada's motion for Summary Judgment on the ground that the indemnity clause contained in the lease contract by the parties violated the Interstate Commerce Commission (I.C.C.) regulations 49 C.F.R. § 1057.4(a)(4) [1057.3(a)]. This judgment was affirmed by the Court of Appeals.

The case found its way into Federal Court through removal by the defendants from the state court where it had been originally filed by plaintiff Sandra Wear. Federal Court jurisdiction was invoked by defendants because of diversity of citizenship (plaintiff was a resident of the state of Illinois: Brada was an Indiana corporation where it also had its principal place of business and Transamerican was incorporated in the state of Michigan with its principal place of business in that state). Plaintiff sought damages in the amount of $250,000.00 (later amended to $500,000.00) thus creating an amount in dispute which exceeded the sum of $10,000.00 exclusive of interest and costs.

The facts of this case have been established in the record by numerous depositions, affidavits and exhibits.

For our purposes, the story starts January 19, 1968, at which time a lease agreement was entered into by which Brada leased a tractor and trailer to Transamerican for a single trip from Detroit, Michigan to Kansas City, Missouri. It was represented by Brada in the lease that this was a trip in the direction of a point which Brada was authorized to serve. Additionally, the lease provided that Transamerican, during the term of the lease, should have control and responsibility for the operation of the leased equipment. The vehicle was operated during the term of the lease by Howard Hardrick, a full-time driver and employee of Brada. Hardwick was furnished by Brada to Transamerican for the term of the lease although continuing as Brada's employee.

Extensive evidence contained in the record establishes that Transamerican meticulously followed the leasing requirements of the I.C.C. regulations and establishes that during the term of the lease Transamerican in fact had complete control and responsibility of the truck and driver. These contentions were urged by Transamerican and conceded by Brada in the District Court. The District Court in its opinion stated: "Transamerican contends that in the present case it had complete control and responsibility for the tractor and trailer covered by the lease, and Brada Miller does not dispute this contention for purposes of this hearing".

Paragraph 9 of the Lease Agreement contained an indemnity clause by which Brada agreed to indemnify Transamerican from certain losses arising out of the equipment lease. This paragraph concludes with the sentence "Nothing is this paragraph 9 contained shall be construed to in anywise limit the liability of [Transamerican] to the public in connection with the use of said equipment under this agreement".

Following the accident, which occurred during the term of the subject lease, Sandra Wear filed her lawsuit against Brada and Transamerican alleging in her first amended complaint that she suffered injuries as a result of negligence on the part of the driver of the tractor trailer unit. Plaintiff later dismissed her case against Brada. Plaintiff proceeded to trial on her case against Transamerican during the course of which trial a settlement agreement was reached whereby Transamerican paid to plaintiff the sum of $80,000.00. It is the amount of this settlement in addition to its costs and expenses which Transamerican is now seeking to recover from Brada by virtue of the indemnity clause in the lease.

For the purpose of brevity and in order not to unduly burden this Court, evidentiary detail supporting this concise statement of the facts has been omitted.

ARGUMENT

This Court is being asked to grant a writ of certiorari herein in order to resolve a direct conflict between the decision of the United States Court of Appeals for the Seventh Circuit in our present case (Appendix B) and recent decisions of the United States Courts of Appeals for the Fifth Circuit and for the Fourth Circuit in cases involving similar facts. (Appendixes C and D).

The decisions involved construe the regulations of the Interstate Commerce Commission which control the lease and interchange of vehicles and equipment between motor carriers. The decisions of the Seventh Circuit on the one hand and of the Fourth and Fifth Circuits on the other hand are diametrically opposed to each other without possibility of reconcilation other than by a decision by this Court.

Specifically, the issue involves the validity of an indemnity clause contained in the lease agreement by which the lessor of the tractor and trailer agreed to indemnify lessee from certain losses.

The I.C.C. regulations provide as to certain leases that the leasing carriers must agree "in writing that control and responsibility for the operation of the equipment shall be that of the lessee * * *" 49 C.F.R. 1057.3(a). As to other types of leases, the regulations provide that the lease "shall provide for the exclusive possession, control and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee * * *" 49 C.F.R. 1057.4(a)(4).

It is the construction of this language which has left the Seventh Circuit in conflict with the Fourth and Fifth Circuits.

On this issue, the decision of the Seventh Circuit in our present case holds that an indemnity clause itself in a truck lease agreement by attempting to shift potential financial burden

from the lessee, violates the I.C.C. regulations with respect to control and responsibility and is invalid. This is held to be true even though the facts otherwise show complete compliance with the I.C.C. regulations and show that actual control and responsibility is in fact with the lessee.

In conflict with this, the Fourth and Fifth Circuits have each rendered decisions upholding the validity of an indemnity clause in a lease which otherwise complies with the I.C.C. regulations on the subject.

The subject initially came before the Seventh Circuit in the case of *Alford v. Major* (7th Circ. 1972), 470 F. 2nd 132. In that case two carriers entered into a trip lease agreement by which the lessor indemnified lessee against certain losses. The Court held that this indemnity clause was against public policy and was in violation of 49 C.F.R. § 1057.4(a)(4).

By the time the case of *Allstate Insurance Company v. Alterman Transport Lines, Inc.* (5th Circ. 1972), 465 F. 2nd 710 had reached the 5th Circuit, the *Alford* case had been decided in the District Court and the 5th Circuit opinion considers the *Alford* District Court decision (*Alford v. Major*, 314 F.Supp. 979), distinguishing it.

The decision of the 5th Circuit in the *Allstate* case states "* * * we find nothing in the language of 49 C.F.R. § 1057.4 (a)(4) which would prohibit two freely contracting parties from determining, as between themselves, which party will ultimately bear the cost of damages done to a third person. The only conceivable argument against such an arrangement would be that the regulation seeks to prevent indemnification on the theory that a trucking company, knowing it does not have to pay damages, might tend to be less careful in supervising and controlling the actions of its truck drivers. However, the same can be said of insurance coverage which the regulations ob-

viously do not prohibit. We are of the opinion that had the I.C.C. intended to prevent indemnification between trucking companies it would have said so in precise terms". *Allstate v. Alterman*, 465 F. 2nd l.c. 713.

Further in its opinion in *Allstate*, the Fifth Circuit validly distinguishes the facts in *Alford* pointing out that "in Alford there was a prima facie violation of 49 C.F.R. § 1057.4(a)(4) because the lessee allowed the lessor to retain full control over the truck and driver during the term of the lease." 465 F. 2nd l.c. 714.

On the other hand, in the *Allstate* case the lessee had in fact assumed control of the leased equipment. The reasons which existed in *Alford* for invalidating the lease (lack of actual control by lessee) were not found in *Allstate*. The Fifth Circuit thus held that where the I.C.C. regulations were otherwise complied with an indemnity clause in the lease agreement would be upheld.

Subsequent to the decision in *Allstate* the Seventh Circuit rendered its decision in *Alford*. However, that decision makes no mention of the *Allstate* decision and does not consider it.

Chronologically, the next event in the sequence of the consideration of this subject by the United States Courts of Appeals occurs in the decision of the Fourth Circuit in the case of *Carolina Freight Carriers Corporaton v. Pitt County Transportation Company*, 492 F. 2nd 243. This decision was rendered February 21, 1974 and by it the Fourth Circuit reversed the District Court judgment. The District Court in *Carolina Freight Carriers Corporation v. Pitt County Transportation Company*, 358 F. Supp. 1177, in granting summary judgment to defendant had followed the decision of the Seventh Circuit in the *Alford* case and held that the indemnity clause was invalid.

In its decision in the *Carolina Freight Carriers* case, 492 F. 2nd 243, the Fourth Circuit agreed with the decision of the

Fifth Circuit in *Allstate* and stated "Nor do we find the indemnification provision violative of either the spirit or letter of the I.C.C. regulation." 492 F. 2nd, l.c. 246.

The Fourth Circuit concurred with the distinction the Fifth Circuit had made of the *Alford* case for the reason that in *Alford* the lessor had, in fact, retained full custody and control over the truck and driver in a prima facie violation of the regulations.

In its decision in our present case the Seventh Circuit has stated, "We do not agree that *Alford* can be distinguished from *Alterman*.[5] The Fifth Circuit determined that 49 C.F.R. § 1057.4(a)(4) did not prohibit the parties from determining between themselves which party would bear the costs. The District Court in *Alford* expressly rejected this interpretation (*see* n. 2, *supra*) and our affirmance specifically recognized that the indemnity clause itself circumvents the regulations." *Wear v. Brada Miller Freight Lines, et al.* (7th Circ.), Number 73-1773, decided May 6, 1974, not yet reported (Appendix B).

Thus, in our present case as shown by the evidence and conceded by the parties, we have a factual situation which shows actual control and responsibility for the leased equipment to be with the lessee. The decisions of the Fourth and Fifth Circuits in the *Carolina Freight Carriers* and the *Allstate* cases show that these Courts would uphold the validity of the indemnity clause in our present case because our case is distinguishable from the *Alford* case in the same manner as the distinctions made in the *Carolina Freight Carriers* and the *Allstate* cases.

In conflict with this, the Seventh Circuit now states in *Wear* that the *Alford* case cannot be distinguished from the *Allstate* case but that instead any indemnity clause in a lease of this type will be invalid regardless of compliance with the I.C.C. regulations.

The problems created are not unique to the cases immediately involved and cited in petitioner's argument herein. Instead,

the situation arises frequently in the trucking industry. Many times daily across the country leases of trucking equipment are signed. Under the present state of the law we find lessors and lessees of trucking equipment unable to ascertain their rights and relationships with each other. The rights of the parties and the affect of the regulations of the Interstate Commerce Commission will vary and fluctuate depending upon which jurisdiction is determining these rights and interpreting the regulations.

The trucking industry could not adequately and orderly move freight and cargo across our country to sustain our economy without the ability to exchange equipment where necessary. The national policy on this subject is established by the Interstate Commerce Commission in its regulations and the conflicts between the Circuits in interpretation of this policy has left a confusion in the industry.

There have been a number of decisions on this subject from different jurisdictions. Several of these are cited in the cases referred to herein. These cases help demonstrate to an extent the frequency with which this problem arises.

It can be seen that the decisions in the *Alford* and the *Allstate* cases have each had their impact upon the law on this subject. For example, the decision in the *Alford* case has been followed and relied upon by the Supreme Court of Nebraska in the case of *Denver Midwest Motor Freight, Inc. v. Busboom Truck, Inc.*, 190 Neb. 231, 207 NW 2nd 368 (1973) and by the District Court for the Eastern District of Virginia in the case of *Carolina Freight Carriers Corporation v. Pitt County Transportation Company*, 358 F. Supp 1177. On the other hand, the *Allstate* case has been followed by the Fourth Circuit in its decision in *Carolina Freight Carriers Corporation v. Pitt County Transportation Company*, 492 F. 2nd 243. Given more time without intervention and guidance by this Court, the conflict on this subject will spread adding further confusion as

various other courts by their decisions place themselves behind either the Seventh Circuit and the *Alford* case or the Fifth Circuit and the *Allstate* case.

CONCLUSION

It is respectfully submitted that because of the clear conflict between the decisions of the Courts of Appeals leaving confusion on a subject of great importance to the nation's trucking industry, the within petition for a writ of certiorari should be granted so that the decision of the Seventh Circuit Court of Appeals can be reviewed and a definitive decision rendered by this Court.

Respectfully submitted

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APPENDIX

APPENDIX A

In the United States District Court for the Southern District of Illinois, Southern Division

Sandra Wear,
Plaintiff,
vs.
Brada Miller Freight System, Inc., and Transamerican Freight Lines, Inc.,
Defendants.
Civil No. 4289

Opinion

(Filed Apr. 25, 1973)

This cause came before the Court on the Motion of Defendant Brada Miller Freight System, Inc., for Summary Judgment. In this action, Transamerican Freight Lines, Inc. (Transamerican), by its Amended Crossclaim, seeks to recover from Brada Miller Freight System, Inc. (Brada Miller), the amount paid by Transamerican to settle plaintiff's claim.

Transamerican alleges that on January 18, 1968, Brada Miller entered into a lease agreement whereby Brada Miller leased a tractor and trailer to Transamerican for a single trip from Detroit, Michian to Kansas City, Missouri. On January 22, 1968 the Plaintiff Sandra Wear was injured when her automobile was struck by the leased vehicle. Transamerican further alleges that at the time of the accident the tractor and trailer was being driven under the lease agreement by an "agent, servant and employee" of Brada Miller. The tractor and trailer was being operated at the time under an Interstate Commerce Com-

mission permit held by Transamerican. Transamerican settled the plaintiff's injury claim by a payment to plaintiff of $80,000.00.

The lease agreement contained the following indemnity provision:

> "It is mutually understood and agreed by and between the parties hereto that First Party (Transamerican Freight Lines, Inc.) shall not be responsible to Second Party (Brada Miller Freight System, Inc.), its agents, servants and employees, for any negligence of the Second Party, its agents, servants or employees, or for any loss, damage, injury or expense arising out of the failure of Second Party to carry out the terms of this agreement. Second Party hereby agrees to indemnify and save harmless First Party from any and all claims, suits, losses, fines, or other expenses arising out of, based upon, or incurred because of injury to any person or persons, or damage to property sustained or which may be alleged to have been sustained by reason of any negligence or alleged negligence on the part of Second Party, its agents, servants, or employees, and for any loss or damage to cargo resulting from any negligence or unlawful act of Second Party, his agents, servants and employees. It is mutually understood and agreed that Second Party will defend at his own expense and cost, any and all suits that may be brought against First Party for injuries sustained, including death resulting therefrom, or damage to property caused or alleged to have been caused by the negligence of any person employed by Second Party, while engaged in the performance of any of the work required by the terms and conditions of this agreement, and for any cargo loss sustained resulting from any negligence or unlawful act on the part of Second Party, his agents, servants, and employees."

Relying on the above indemnity provision, Transamerican now seeks to recover from Brada Miller the amount Transamerican paid to plaintiff plus expenses.

The lease agreement referred to in Transamerican's Amended Crossclaim was governed by the following provision of the Interstate Commerce Act:

> (e) . . . the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles, not owned by them, in the furnishing of transportation of property
>
> > (2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles . . . 49 USC 304(e) (1958).

Pursuant to such delegation of authority the ICC enacted regulations governing these matters.

> 49 C.F.R., Section 1057.4 . . . authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:
>
> > (a) *Contract requirements.* The contract, lease, or other arrangement for the use of such equipment:
> >
> > > (4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except: (exceptions not pertinent).

In a very recent case decided by the U. S. Court of Appeals for the 7th Circuit, Alford v. Major, 470 F2d 132 (1972), the Court was faced with a fact situation almost identical to this case. In Alford, Major Truck Lines (Major) leased a truck

and driver from Carriers, Inc. (Carriers) under a trip lease which provided that Carriers was to indemnify Major from losses suffered by Major because of third party claims brought against Major as a result of the negligence of the driver furnished by Carriers. Plaintiff was killed in an accident caused by the negligence of the truck driver. The wrongful death action was settled by Major which sought to recover from Carriers under the indemnity provision of the trip lease. In denying recovery, the Court stated:

> l.c. 135 "Therefore, since the indemnification clause would permit Major to circumvent the regulations' requirement that leased carriers exert actual control over the leased equipment and the borrowed drivers, we find that the indemnification clause is unenforceable."

Because of Alford v. Major, the Court holds the indemnity provision of the lease agreement in the present case violates the provisions of 49 C.F.R., Section 1057.4 and is unenforceable.

Transamerican in its brief has cited the recent case of Allstate Insurance Company v. Alterman Transport Lines, Inc., 465 F2d 710 (5th Circuit) which upheld an indemnity agreement between two trucking companies. Transamerican contends that in the present case it had complete control and responsibility for the tractor and trailer covered by the lease, and Brada Miller does not dispute this contention for purposes of this hearing. Transamerican contends that this fact brings this case within the holding of Allstate v. Alterman.

The indemnity agreement in Allstate v. Alterman however did not contain the provision providing for indemnity because of the negligence of the "agents, servants and employees" of the lessor as in the present case. Alford v. Major has condemned the type of indemnity agreement sought to be enforced in this case and thus can be distinguished from Allstate v. Alterman.

The Court finds that pleadings, answers to interrogatories and motion show that there is no genuine issue as to any material

fact, and that the Defendant Brada Miller is entitled to a judgment as a matter of law.

Accordingly, on the authority of Alford v. Major, 470 F2d 132, the Motion of Brada Miller for Summary Judgment is hereby GRANTED.

Entered this 25th day of April, 1973.

/s/ OMER POOS
United States District Judge

In the United States District Court
for the Southern District of Illinois
Southern Division

Sandra Wear,
Plaintiff,
vs.
Brada Miller Freight System, Inc., and Transamerican Freight Lines, Inc.,
Defendants.
} Civil No. 4289.

Order

The Court, having filed an Opinion in the above entitled cause, and having been fully advised in the premises, and after having carefully considered the records and files herein, hereby ORDERS, ADJUDGES AND DECREES that the Motion for Summary Judgment of Defendant, Brada Miller Freight System, Inc., be, and the same is hereby granted.

Entered this 25th day of April, 1973.

/s/ OMER POOS
United States District Judge

APPENDIX B

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

Argued April 25, 1974

Decided May 6, 1974

before

Hon. Latham Castle, Senior Circuit Judge

Hon. Robert A. Sprecher, Circuit Judge

Hon. Gus J. Solomon, Senior District Judge*

Sandra Wear, Plaintiff, vs. Transamerican Freight Lines, Inc., Defendant-Appellant and Brada Miller Freight Systems, Inc., Defendant-Appellee.	Appeal from the United States District Court for the Southern District of Illinois, Southern Division. No. 68 C 271 Omer Poos, Judge.

No. 73-1773

Order

"Unpublished Order" not to be cited, per Circuit Rule 28

This case is before this court on appeal by defendant-appellant, Transamerican Freight Lines, Inc. (Transamerican), from an order of the district court entered April 25, 1973 granting the motion of defendant-appellee, Brada Miller Freight Systems, Inc. (Brada Miller), for summary judgment. We affirm.

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* Senior District Judge Gus J. Solomon of the District of Oregon is sitting by designation.

I

On January 19, 1968 Brada Miller entered into a lease agreement whereby it leased a tractor and trailer to Transamerican for a single trip from Detroit, Michigan to Kansas City, Missouri. Transamerican inspected the equipment before the trip and made a vehicle inspection report as required by the Interstate Commerce Commission. The driver, Harold L. Hardrick, normally employed by Brada Miller, was "furnished" by Brada for the trip. Transamerican, among other things, checked Hardrick's medical certificate, advanced money to him for expenses during the trip, and instructed him to follow the route certified pursuant to Transamerican's I.C.C. authority.

During the trip, plaintiff Sandra Wear was injured when her automobile was struck by this leased vehicle being operated under Transamerican's I.C.C. permit. Hardrick reported the accident to Transamerican who thereafter reported the accident to the I.C.C. pursuant to I.C.C. regulations.

Plaintiff Wear filed suit against Brada Miller and Transamerican; these defendants each cross-claimed. Ultimately plaintiff dismissed her case against Brada Miller and proceeded to trial against Transamerican. During the course of trial, plaintiff and Transamerican reached a settlement agreement providing for payment of $80,000 to plaintiff. Thereafter Transamerican amended its cross-claim against Brada Miller to plead the settlement, seeking recovery of the settlement amount plus expenses from Brada Miller under an indemnification clause in the lease agreement. The indemnity provision provided that:

> "It is mutually understood and agreed by and between the parties hereto that First Party [Transamerican Freight Lines, Inc.] shall not be responsible to Second Party [Brada Miller Freight System, Inc.], its agents, servants and employees, for any negligence of the Second Party, its agents, servants or employees, or for any loss, damage, in-

jury or expense arising out of the failure of Second Party to carry out the terms of this agreement. Second Party hereby agrees to indemnify and save harmless First Party from any and all claims, suits, losses, fines, or other expenses arising out of, based upon, or incurred because of injury to any person or persons, or damage to property sustained or which may be alleged to have been sustained by reason of any negligence or alleged negligence on the part of Second Party, its agents, servants, or employees, and for any loss or damage to cargo resulting from any negligence or unlawful act of Second party, his agents, servants and employees. It is mutually understood and agreed that Second Party will defend at his own expense and cost, any and all suits that may be brought against First Party for injuries sustained, including death resulting therefrom, or damage to property caused or alleged to have been caused by the negligence of any person employed by Second Party, while engaged in the performance of any of the work required by the terms and conditions of this agreement, and for any cargo loss sustained resulting from any negligence or unlawful act on the part of Second Party, his agents, servants, and employees."

The district court granted Brada Miller's motion for summary judgment relying on *Alford v. Major*, 470 F.2d 132 (7th Cir. 1972).

II

In *Alford v. Major*, 314 F.Supp. 979 (N.D. Ind. 1970), a third party was injured by a truck being operated under a trip lease wherein the lessor, Carriers, leased a truck along with a driver, to the lessee, Major, to be operated under Major's I.C.C. operating permit. Major cross-claimed against Carriers under an indemnification clause whereby Carriers agreed to indemnify Major against damages to persons or property "resulting from negligence of lessor or his driver." 314 F.Supp. at 981. Major claimed that "the actual care, custody and control of the truck remained with the lessor even though the lessee legally assumed the full responsibility therefor to the general public . . ." and therefore, since its liability was predicated solely on its nondelegable duty to the public, it was entitled to indemnification from Carriers whose agent's wrongdoing was the actual cause of the injury. 314 F.Supp. at 982.

The district court found that if the agreement placed the control of the truck and driver in Carriers, this resulted in a violation of the Interstate Commerce Act, 49 U.S.C. § 304(e),[1] which established a public policy against delegation *per se*. Rejecting the reasoning of *Newsome v. Surratt*, 237 N.C. 297, 74

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[1] "(e) . . . the Commission is authorized to prescribe, with respect to the use of motor carriers (under leases, contracts, or other arrangements) of motor vehicles, not owned by them, in the furnishing of transportation of property

> (2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles . . ."

49 U.S.C. § 304(e).

The regulations enacted by the I.C. pursuant to this authority include:

> "49 C.F.R., Section 1057.4 . . . authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:
>
> (a) *Contract requirements.* The contract, lease, other arrangement for the use of such equipment:
>
> (4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except:
>
> (exceptions not pertinent)."

S.E.2d 732 (1953),[2] because of this policy against delegation. the district court concluded:

> "In the opinion of this Court, the main purpose of the statute was to ensure that all interstate operations would be supervised directly by persons familiar with federal safety regulations and amenable to the jurisdiction of the Interstate Commerce Commission. In other words, the intent was to make sure that licensed carriers would be responsible in fact, as well as in law, for the maintenance of leased equipment and the supervision of borrowed drivers. The Interstate Commerce Act was supposed to prevent accidents, as well as to provide financially responsible defendants in the event of their occurrence. And that end could best be achieved if the carriers themselves exerted actual control over leased equipment."

This court affirmed the district court, *Alford v. Major*, 470 F.2d 132 (1972).

> "[A]s the district court held, 'the intent [of the regulations] was to make sure that licensed carriers would be responsible in fact, as well as in law, for the maintenance of leased equipment and the supervision of borrowed drivers.'
>
> . . . [S]ince the indemnification clause would permit Major [lessee] to circumvent the regulations' requirement that leased carriers exert actual control over the leased

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[2] In *Newsome v. Surratt*, the North Carolina Supreme Court, on nearly identical facts, allowed indemnification on the basis that "the duty imposed by law with respect to third parties in no way interfered with the right of the lessor to agree to indemnify the lessee for any loss it might sustain as a result of the negligence, incompetence or dishonesty of any driver which the lessor might furnish to operate the leased truck." 74 S.E.2d at ....

Newsome v. Surratt was likewise rejected in *Carolina Freight Carriers Corp. v. Pitt County Transportation Co.*, 358 F.Supp. 1177, 1179-80 (E.D. Va. 1973).

> equipment and the borrowed drivers, we find that the indemnification clause is unenforceable. See *Carriers Insurance Exchange v. Truck Insurance Exchange*, 310 F.2d 653 (4th Cir. 1972)."

470 F.2d at 135.

Transamerican argued that *Alford* is not applicable to it because here the lessee meticulously followed the I.C.C. regulations and, contrary to the *Alford* case, had assumed complete control over and responsibility for the tractor and trailer covered by the lease.[3] Transamerican relies on *Allstate Insurance Co. v. Alterman Transport Lines, Inc.*, 465 F.2d 710 (5th Cir. 1972) (Alterman) which enforced an indemnity clause in a situation like the one at bar.[4] The Fifth Circuit held that as long as the lessee assumed full common carrier responsibility for the operation of the leased vehicle (including responsibility for the quality of the maintenance), there is "nothing in the language of 49 C.F.R. § 1057.4(a)(4) which would prohibit two freely con-

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[3] Paragraph 4 of the trip lease recites the following:

> "It is mutually understood and agreed, that the first party [Transamerican] during the terms of this lease shall have the control and responsibility for the operation of said equipment in respect to the public, shippers and Interstate Commerce Commission for such period that said equipment is operated under the terms of this lease as provided in Paragraph 1 hereof.

[4] The trip lease in *Alterman* "[c]ontained . . . a provision by which Consolidated [the lessor] agreed to indemnify Alterman [the lessee] for any damage done to or suffered by the driver or other persons in connection with the operation of the tractor-trailer unit during the term of the lease. The lease also provided that . . . [the lessor] was to be responsible for servicing the vehicle and keeping it in good repair."

* * * * * * *

. . . [T]he lease specifically provided that 'said vehicle shall be solely and exclusively under the direction and control of the lessee [Alterman] who *shall assume full common carrier responsibility* . . . for the operation of such vehicle.' (Emphasis supplied)." 465 F.2d at 712-13.

tracting parties from determining, as between themselves, which party will ultimately bear the cost of damages done to a third party." 465 F.2d at 713. Transamerican urged that we adopt the factual distinctions recognized in *Alterman*:

> "In *Carriers* [*Carriers Ins. Exchange v. Truck Ins. Exchange*, 310 F.2d 653 (4th Cir. 1962)] the indemnification clause was struck down because the two contracting trucking companies violated an I.C.C. safety regulation [49 C.F.R. § 1057.4(c)] and created a dangerous condition which resulted in injury to an innocent third party. In *Alford* [314 F.Supp. 979] there was a *prima facie* violation of 49 C.F.R. § 1057.4(a)(4) because the lessee allowed the lessor to retain full control over the truck and the driver during the term of the lease."

465 F.2d at 713-14.

We do not agree that *Alford* can be distinguished from *Alterman*.[5] The Fifth Circuit determined that 49 C.F.R. § 1057.4 (a)(4) did not prohibit the parties from determining between themselves which party would bear the costs. The district court in *Alford* expressly rejected this interpretation (*see* n. 2, *supra*) and our affirmance specifically recognized that the indemnity clause itself circumvents the regulations.

Transamerican's argument proceeds from the premise that control and cost bearing are not related. We disagree. In *Alford* we interpreted the regulations as requiring the party who has the duty of responsibility and control under 49 U.S.C. § 304(e) to internalize the cost of any breach of this duty. This

[5] Transamerican contends that in *Alford* the parties agreed to place full control in the lessor; apparently, the *Alterman* court assumed this as well. All that is clear from the *Alford* opinions is that the lessee *argued* that control remained in the lessor. In any event, our disposition makes this aspect irrelevant.

forces the lessee to take costs into account in the exercise of such duty.[6]

Accordingly, the judgment of the district court is affirmed. *Accord, Carolina Freight Carriers Corp. v. Pitt County Transportation Co.*, 358 F.Supp. 1177 (E.D. Va. 1973); *Denver Midwest Motor Freight, Inc. v. Busboom Truck, Inc.*, 190 Neb. 231, 207 N.W. 2d 368 (1973).

Affirmed

[6] An insurance arrangement does not affect this principle since over a period of time insurance rates reflect the level of care exercised. The indemnity agreement herein involved, if enforced, would separate control and cost bearing because under Transamerican's argument, the lessee did in fact exercise control. *Contra, Allstate Ins. Co. v. Alterman Transport Lines*, 465 F.2d at 713.

APPENDIX C

Allstate Insurance Company,
Plaintiff-Appellee,

v.

Alterman Transport Lines, Inc.,
Defendant-Appellee-Cross-Appellant,

v.

Consolidated Systems, Inc.,
Defendant-Appellant-Cross-Appellee.

Allstate Insurance Company,
Plaintiff-Appellee-Cross-Appellant,

v.

Alterman Transport Lines, Inc.,
Defendant-Appellee-Cross-Appellant,

v.

Consolidated Systems, Inc.,
Defendant-Appellant-Cross-Appellee.

Nos. 31139, 71-2103.

United States Court of Appeals, Fifth Circuit.

Aug. 30, 1972.

Rehearing Denied Oct. 2, 1972.

465 F.2d 710 (1972)

Before Rives, Bell and Morgan, Circuit Judges.

Lewis R. Morgan, Circuit Judge:

The question presented in this suit for indemnification is which of three parties must ultimately bear the loss for monies

paid out in settlement of a tort claim. The district court held that an insurance policy issued by Allstate Insurance Company did not afford coverage for the injury; that Alterman Transport Lines, Inc., was primarily liable for payment of the tort claim; but that Alterman was entitled to be reimbursed by Consolidated Systems, Inc., due to an indemnification agreement between the two corporations. After considering the various assignments of error, we affirm the final judgment[1] of the district court.

The event which gave rise to this litigation occurred in 1964 on a Florida highway when a tractor-trailer unit driven by Elmer Stewart crashed into the rear of an automobile driven by John Maguire. The tractor-trailer unit was on lease to Alterman from Consolidated for the duration of a single trip from Chicago, Illinois, to Miami, Florida.[2] Contained in the lease was a provision by which Consolidated agreed to indemnify Alterman for any damage done to or suffered by the driver or other persons in connection with the operation of the tractor-trailer unit during the term of the lease. The lease also provided that Consolidated was to be responsible for servicing the vehicle and keeping it in good repair. Consolidated's insurance carrier was Allstate.

After the collision Maguire filed suit for personal injuries in a Florida state court against Consolidated, Alterman, and Elmer Stewart. The state court suit was finally settled for $16,000.00 with Allstate and Alterman each paying half.

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[1] This judgment was entered on September 30, 1970, as opposed to the initial judgment which was entered along with the court's opinion on September 3, 1970.

[2] The reason for the lease was that Consolidated was not authorized under I.C.C. regulations to haul non-exempt commodities in the State of Florida. Consolidated had taken a load of exempt commodities from Florida to Illinois and the lease arrangement allowed Consolidated to return to Florida with a revenue-producing load rather than an empty truck.

Allstate then filed suit in federal district court for a declaratory judgment of liability as between itself, Consolidated, Alterman, and Alterman's alleged insurance carrier, Citizens Casualty Company. The district judge granted summary judgment against Citizens and in favor of Allstate, but on appeal this court reversed and held that Citizens did not afford insurance coverage for the Maguire accident. Consolidated Systems, Inc. v. Allstate Insurance Company, 5 Cir. 1969, 411 F.2d 157. This court then remanded the case so that a complete factual record might be developed concerning the liabilities of the three remaining parties—Alterman, Allstate and Consolidated.

On remand the district court entered findings of fact and conclusions of law, and held that Allstate was entitled to indemnification from Alterman; and that Alterman, in turn, was entitled to indemnification from Consolidated. The district court reached this result by first concluding that Alterman, by virtue of its complete control over the tractor-trailer unit and the driver, was the active tort-feasor and primarily liable for payment of Maguire's personal injury claim. The court next held that Allstate's insurance policy did not cover the damage done to Maguire, and thus, Allstate could collect the amount it paid ($8,000.00) in settlement of the tort claim, plus attorneys' fees expended in the state court action from the primary tort-feasor, Alterman. Allstate was not awarded recovery of attorneys' fees for prosecution of the federal suit. However, since Alterman and Consolidated had signed the indemnification agreement, which the court upheld as valid, Alterman was allowed to recover from Consolidated all sums paid to Allstate, plus the sums advanced in defending and settling the tort claim with Maguire, and the expenses incurred in prosecuting the federal suit for indemnification. The net effect of the district court's judgment was that Consolidated was liable, either directly or indirectly, for all sums expended by Allstate and Alterman in settling the tort claim at the state court level, plus the monies expended by Alterman in prosecuting the federal indemnity action.

On this appeal all three parties attack the district court's holding by raising various interdependent issues which we deal with in sequential order.

Validity of the Indemnification Agreement

[1] In the indemnification clause of the Consolidated-Alterman lease, Consolidated agreed to "be responsible for any loss, personal injury, death and/or damage that may be done to or suffered by drivers or other persons in connection with the operations to be carreid out pursuant to this agreement" and to "indemnify and save harmless [Alterman] against claim for any such loss". The lease further provided that Consolidated was to maintain and service the tractor-trailer unit and keep it in good repair during the hauling operation. Consolidated contends that the entire lease is invalid as against public policy because both of these clauses violate the Interstate Commerce Commission regulation which states that any contract for the use of leased trucking equipment "shall provide for the exclusive possession, control and use of the equipment, and for the complete assumption of responsibility in respect thereto". Title 49, C.F.R., § 1057.4(a)(4).

As to the clause requiring Consolidated to maintain and service the tractor-trailer unit, Consolidated claims that the responsibility for vehicular maintenance was illegally shifted by Alterman to its lessor, contrary to the letter and spirit of the I.C.C. regulations. The purpose of the regulations, according to Consolidated, was to protect the public from unsafe vehicles by requiring each trucking company to be responsible for the mechanical condition of all the equipment it put on the highway. We need not decide the merits of this contemplation,[3]

[3] It would be hazardous to do so in any event since the Interstate Commerce Commission was not a party to this litigation and filed no briefs on the issue.

however, because the record in this case does not support Consolidated's initial assumption, i. e., that Alterman avoided responsibility for maintenance of the vehicle. Although not mentioned in either of the briefs, the lease specifically provided that "said vehicle shall be solely and exclusively under the direction and control of the lessee [Alterman] who *shall assume full common carrier responsibility . . . for the operation of such vehicle.*" (Emphasis supplied). Furthermore, prior to the Chicago-Miami trip, Alterman had the tractor-trailer unit inspected for mechanical defects. This fact is evidenced by an inspection sheet in the record listing some 19 different items which were inspected and found to be in good working order by a qualified mechanic.[4] The inspection sheet was signed by a responsible Alterman employee who certified that the person inspecting the vehicle was qualified to make an inspection and authorized to do so as a representative of Alterman. Thus, contrary to the assertion of Consolidated, Alterman was at all times *responsible* for the quality of the maintenance performed on the leased vehicle even though Alterman employees were not themselves bound to repair the vehicle. That responsibility was not evaded by requiring Consolidated to perform the actual mechanical work, any more than it would have been an evasion for Alterman to contract for vehicular maintenance with a private garageman, because Alterman continued to bear responsibility for the vehicle's mechanical condition.

[2] Turning to the indemnification clause itself we find nothing in the language of 49 C.F.R. § 1057(a) (4) which would prohibit two freely contracting parties from determining as between themselves, which party will ultimately bear the cost of damages done to a third person. The only conceivable argument against such an arrangement would be that the regulation seeks to prevent indemnification on the theory that a trucking company, knowing it does not have to pay damages, might

[4] We are not informed whether the mechanic was an employee of Alterman.

tend to be less careful in supervising and controlling the actions of its truck drivers. However, the same can be said of insurance coverage which the regulations obviously do not prohibit. We are of the opinion that had the I.C.C. intended to prevent indemnification between trucking companies it would have said so in precise terms.

Although Consolidated cites Carriers Insurance Exchange v. Truck Insurance Exchange, 4 Cir. 1962, 310 F.2d 653, and Alford v. Major (N.D.Ind., 1970) 314 F.Supp. 979, as authority for invalidating the indemnification agreement, we find those cases inapplicable to the facts here involved. In *Carriers* the indemnification clause was struck down because the two contracting trucking companies violated an I.C.C. safety regulation[5] and created a dangerous condition which resulted in injury to an innocent third party. In *Alford* there was a *prima facie* violation of 49 C.F.R. § 1057.4(a)(4) because the lessee allowed the lessor to retain full control over the truck and the driver during the term of the lease. As we have previously held in this opinion, Alterman's arrangement with Consolidated did not abrogate pertinent I.C.C. regulations. The absence of any regulatory violation on the part of Alterman removes this indemnification clause from the public policy considerations which were present in *Carriers* and *Alford*.

[3] Finally, we find no merit in Consolidated's contention that the plain language of the indemnification clause[6] excludes

[5] Title 49, C.F.R. § 1057.4(c).

[6] The entire clause reads as follows:

"[Lessor] Agrees to be responsible for any loss, personal injury, death and/or damage that may be done to or suffered by driver(s) or other persons in connection with the operations to be carried out pursuant to this agreement and shall indemnify and save harmless the Lessee against claim for any such loss, injury, death and/or damage and against any claim for compensation to any such person whatsoever. This shall apply to all cases of such loss, injury, death and/or damages, including cases of loss, injury, death and/or damages, for which either or both parties hereto may or shall be liable."

third-party injuries and applies only to injuries suffered by the truck driver or other individuals engaged in the leasing operation.

Actual Liability of Elmer Stewart

[4, 5] Although Consolidated signed an agreement allowing Allstate and Alterman to settle the Maguire lawsuit, the agreement specifically provided that any such settlement would not affect the rights of the parties in the federal suit for indemnity. Consolidated contends that it is not bound to indemnify Alterman because, assuming the validity of the indemnification agreement, no proof was ever offered that the driver of the truck, Elmer Stewart, was negligent and legally responsible for the collision which injured Maguire. However, in a finding of fact, which is not disputed on this appeal, the district court found that the tractor-trailer unit struck Maguire's automobile from the rear while both vehicles were traveling in the same direction. Under Florida law a rear-end collision raises a presumption of negligence on the part of the overtaking vehicle. Busbee v. Quarrier, Fla.App.1965, 172 So.2d 17. A review of the record reveals that Consolidated at no time requested the district court to take evidence on the question of the actual liability of Elmer Stewart, and Consolidated does not now argue before this court that it has affidavits, or any other possible source of evidence, which would tend to rebut this presumption of negligence which is raised by an undisputed fact. Thus, assuming without deciding, that proof of actual liability is required in this case, Consolidated has failed to create any issue of fact as to the negligence of the truck driver under Florida law.

Whether Allstate Provided Insurance Coverage for the Maguire Accident

[6] In holding that Allstate's insurance policy did not extend coverage to the damages suffered by Maguire, the district court

first concluded that, under the literal terms of the policy, Alterman was not afforded coverage for the Maguire accident. This conclusion is not contested by Alterman or Consolidated on appeal. Secondly, the court held that Alterman was the active tort-feasor and primarily liable for the injuries to Maguire due to the fact Alterman had possession of the tractor-trailer unit and control over the driver at the time the collision occurred. Alterman's argument on this point boils down to an assertion that the district court erred, as a matter of law, in holding that Alterman controlled and directed the truck driver during the term of the lease. It is readily apparent, however, that the district court's holding was based upon numerous undisputed facts which overwhelmingly support the conclusion under Florida law that the truck driver was under Alterman's control. See Martin v. Lloyd Motor Company, Fla.App.1960, 119 So.2d 413; Mercury Cab Owner's Association v. Jones, Fla.1955, 79 So.2d 782; Wilson v. Burke, Fla.1951, 53 So.2d 319. In its findings of fact the district court discussed in detail the relationship that existed between Elmer Stewart and Alterman and Consolidated:

> "Stewart at all times material to this action was not an employee of Consolidated. Stewart did not receive wages or a salary from Consolidated; he received as rent, a percentage of the net revenue generated by the leased equipment. Consolidated did not withhold money from Stewart's rental income for income tax or social security. Consolidated did not pay on behalf of Stewart, any monies to the Federal Government as employer's contributing share of an employee's social security payment. The President of Consolidated, John J. Jerue, testified that Stewart was not considered an employee. Consolidated considered Stewart to be self-employed or an independent contractor. . . . During the term of the single trip lease, the motor vehicle equipment was operated under Alterman's permit and authority, and over routes which Alterman was authorized

to serve. Alterman placards were installed on the exterior of the vehicle for the trip. Consolidated was not authorized by any public authority to transport non-exempt commodities in or into Florida. . . . Alterman had the right to accept or refuse Stewart as the driver of the leased equipment. Alterman accepted Stewart and provided him with detailed information and instructions as to Alterman's permits in the various states, telephone numbers of Alterman's terminals, names of Alterman people to be contacted at each terminal, and directions to check-call the Alterman terminal in Miami on a daily basis during the course of the transportation being performed under the trip-lease."

None of these findings is contested by Alterman. Moreover, all the facts which Alterman cites as contra to the court's conclusion concern various acts by Stewart which occurred before the lease came into existence and not at a time when Stewart was allegedly operating for Alterman.

The district court's holding that Allstate was not liable for Maguire's damages is without error.

Allstate's Right to Indemnification from Alterman

[7] There has been some question on this appeal as to the theory under which the district court allowed Allstate to recover from Alterman. Both Consolidated and Alterman contend that in order to recover Allstate must have a contractual relationship with the indemnitor, or alternatively, Allstate must subrogate its claim to Consolidated, in which case Allstate would be barred from recovery by the Consolidated-Alterman indemnity agreement. We reject this contention. Under Florida law Allstate is entitled to indemnification because it paid damages in good faith on account of the negligent and tortious act of another (Alterman) and a contractual relationship with Alterman is not required. See Mims Crane Service, Inc. v. Insley

Mfg. Corp., Fla.App.1969, 226 So.2d 836; Olin's Rent-A-Car Sys. v. Royal Continental Hotels, Fla.App.1966, 187 So.2d 349. The district court properly held that Alterman must indemnify Allstate for monies paid out in settlement of the tort claim.

The District Court's Holding That Consolidated Breached Its Subrogation Agreement With Allstate

We turn now to a point in the district court's opinion which has been the source of considerable confusion to the parties in this litigation. As its final conclusion of law, the district court held that:

"The indemnification agreement contained in the Consolidated-Alterman motor vehicle lease and agreement of February 6, 1964, effectively breached the subrogation clause of Allstate's policy[7] issued to Consolidated, resulting in a forfeiture of coverage for the Maguire accident and a liability for damages consequent upon the breach of Consolidated."

In its briefs Consolidated argues at length that the Consolidated-Allstate subrogation clause was not breached by the Consolidated-Alterman indemnity clause, and that the district court's holding on this issue is inconsistent with the court's prior holding that Allstate was entitled to indemnification from Alterman. On the other hand, Allstate argues in support of the district court's holding.

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[7] The subrogation clause stated as follows:

"Subrogation. In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights."

We are of the opinion, however, that it was unnecessary for the court to rule on whatever effect the indemnity agreement may or may not have had on Allstate's right of subrogation via Consolidated. Once the court held (1) that Alterman was primarily liable for the tort claim of Maguire and (2) that Allstate's insurance policy did not cover Alterman, there was no need to rule further in regard to Allstate. At that point Allstate was entitled to recover the sums it expended in settling the Maguire lawsuit from Alterman and the case was ended as far as Allstate was concerned.

The foregoing analysis is supported by the final judgment entered by the district court on September 30, 1970. Allstate was awarded judgment against Alterman, and in a separate part of the final judgment, Alterman was granted recovery against Consolidated. No mention is made of any recovery by Allstate against Consolidated, despite statements to the contrary in the court's opinion and initial judgment entered on September 3, 1970. We hold that the district court's final judgment correctly reflects the respective liabilities of the three parties and that Consolidated was not directly liable to Allstate.

Denial of Allstate's Recovery of Attorneys' Fees in the Federal Indemnity Suit

[8, 9] Although the district court allowed Allstate to recover from Alterman attorneys' fees expended in settling the Maguire lawsuit, the court denied Allstate recovery of its expenses incurred in prosecuting this action for indemnification. The general rule in Florida is that attorneys' fees are not recoverable in the absence of an express contract or a statutory provision, e. g., Ginsberg v. Ginsberg, Fla.App.1961, 128 So.2d 435. The cases[8] cited by Allstate are not authority for excepting this claim

[8] Morse Auto Rentals, Inc. v. Dunes Enterprises, Inc., Fla.App. 1967, 198 So.2d 652; Thomas Awning and Tent Co. v. Toby's Twelfth Cafeteria, Fla.App.1967, 204 So.2d 756; Fincher Motor Sales, Inc. v. Lakin, Fla.App.1963, 156 So.2d 672; Fontainebleau Hotel Corporation v. Postol, Fla.App.1962, 142 So.2d 299; Hertz Corporation v. Ralph M. Parsons Company (M.D.Fla.1968), 292 F.Supp. 108.

for attorneys' fees from the general rule in Florida. Allstate's contention that the district court erred in denying the attorneys' fees is without merit.

To summarize the effect of our disposition of the several issues on this appeal, we note that Alterman, as the active tortfeasor, was primarily responsible for payment of the Maguire tort claim. Were it not for the Consolidated-Alterman indemnity contract, Alterman would bear the entire cost of the Maguire settlement and Consolidated would pay nothing. However, because of the valid indemnity contract, Consolidated must reimburse Alterman for all Alterman's losses.

The final judgment of the district court is hereby affirmed.

APPENDIX D

Carolina Freight Carriers Corporation for the Use and Benefit of Liberty Mutual Insurance Company, Appellant,

v.

Pitt County Transportation Company and Old Republic Insurance Company, Appellees.

No. 73-1812.

United States Court of Appeals, Fourth Circuit.

Argued Nov. 8, 1973.

Decided Feb. 21, 1974.

492 F.2d 243 (1974)

Before Winter, Butzner and Field, Circuit Judges.

Field, Circuit Judge:

Finding an indemnification provision in a lease of motor carrier equipment to be violative of a pertinent regulation of the Interstate Commerce Commission, the district court granted defendant's motion for judgment on the pleadings and the plaintiff has appealed.

The facts are not in dispute. Carolina Freight Carriers Corporation [Carolina] leased a tractor-trailer truck accompanied by its driver from Pitt County Transportation Company [Pitt]. During the rental period the driver allegedly parked improperly on a highway wayside and the truck moved backwards striking one Robert Powers and his infant daughter. The infant was

killed and Powers was seriously injured. Thereafter, Carolina's insurer compromised the claims by payment of $50,000, and Carolina now seeks indemnity on behalf of its insurer from Pitt, the lessor.[1]

The issue presented to the court below was whether Pitt owed a duty to indemnify Carolina under the provisions of the lease, a copy of which was incorporated in the complaint as an exhibit thereto and which reads in pertinent part as follows:

> Carolina Freight Carriers Corporation, Lessee, hereby acknowledges receipt of and leases from Pitt County Trucking Co., Lessor, of Farmville, North Carolina * * * for its exclusive possession, control and use, and assumes complete responsibility in respect thereto for the duration of this Motor Vehicle Trip Agreement, the following vehicular equipment to be used by said lessee beginning at 1 PM o'clock on 6/19/69 in its interstate service to transport merchandise.
>
> * * * * * * * *
>
> 2. Lessee will assume and pay all costs of public liability and property damage insurance on the vehicle while operating at the direction of the Lessee and provide insurance covering cargo being transported at the direction of the Lessee. *However, in the event any loss or damage to cargo or property damage or personal injury to any third person takes place by reason of negligence or dishonesty of the owner, its Agents, servants, or employees, then the owner does hereby agree to assume and be fully responsible for any such damage and, in the event payment shall be made by the Lessee herein, Lessor does hereby agree to indemnify the Lessee and hold the Lessee harmless for any and all claims.*

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[1] For the purpose of clarity, this opinion will refer to the parties as "Carolina" and "Pitt."

In the event that Lessee's insurance company is required to make payment therefor, then, and in that event, the insurance company shall be subrogated to the rights of the Lessee against the Lessor herein.

* * * * * * *

5. Lessor agrees that during the term of this lease *the motor vehicle equipment described above shall be under such control of the Lessee as required by the rules and regulations of the Interstate Commerce Commission* and for the limited purpose of safety to the public and safe delivery of shipment.

* * * * * * *

7. Lessor agrees to be fully responsible for the above described equipment maintaining said equipment in accordance with the "safety" regulations and specifications set forth by the Interstate Commerce Commission to keep said equipment in good operating condition and appearance; to maintain such records as shall be required by the Interstate Commerce Commission, Government, State, or any other regulatory authority. Lessor agrees to provide at his sole and own expense all necessary oil, gasoline, fuel, tires, repairs, accessories, and/or other items required for the operation and maintenance of said vehicle during the term of this lease. Lessee may require Lessor to store his equipment when not in use on the Lessee's premises.

* * * * * * *

9. Lessor agrees that during the term of this lease:

(a) He will be solely responsible for the payment of his own Social Security Taxes, Old Age Benefits, Unemployment Compensation, Taxes, Workmen's Compensation Insurance, Federal Income Taxes, license fees, and payment of all payroll deductions and taxes for employees furnished by the Lessor.

(b) To pay fines, costs and expenses incurred in the operation of the equipment leased herein in the performance of this lease are to be borne by and be the sole responsibility of the Lessor.

(c) *To indemnify Lessee against loss or liability, if any resulting from the injury or death of the driver or drivers of the vehicle above described or any helpers employed by such drivers in connection with the loading or unloading of said vehicles.*

(d) *To indemnify Lessee against any loss or damage resulting from the negligence, incompetence or dishonesty of said drivers or helpers.*

(e) To indemnify Lessee against any loss or damage to or destruction of the trailer or other such equipment of the Lessee, towed by the Lessor or his employees.

(f) To indemnify the Lessee against any loss resulting from claims brought against the Lessee for any property damage and bodily injury sustained by the public while the tractor is detached from a trailer.

* * * * * * * *

11. The Lessor shall perform this contract in a safe, competent and workmanlike manner and shall be responsible to the Lessee for complying and together with his employees, agents and servants shall comply with all applicable requirements of federal, state and local government including but not limited to the rules and regulations of the Interstate Commerce Commission.

12. The Lessor shall at its expense employ all necessary drivers, driver's helpers, and laborers who shall be ex-

perienced, competent, and qualified to carry out work to be performed by the Lessor under this contract. Such employees shall also be qualified under and meet all the requirements of applicable federal and state laws and municipal ordinances and the rules and regulations of the Interstate Commerce Commission and other regulatory authorities.

* * * * * * *

18. This is the entire agreement of the parties. No alteration, amendment or future understanding shall be binding unless in writing and signed by both parties. *This agreement shall be governed by the laws of the State of North Carolina.* This Motor Vehicle Equipment Lease supercedes and cancels all prior agreements and leases entered into by the parties. (Emphasis supplied.)

In its answer to the complaint Pitt did not dispute the execution or terms of the lease agreement, but alleged that the provisions with respect to indemnification and the responsibility of Pitt are unenforceable since they are contrary to the regulations of the Interstate Commerce Commission. The relevant regulatory section, 49 C.F.R. 1057.4, reads:

"(a) *Contract requirements.* The contract, lease, or other arrangement for the use of such equipment:

* * * * * * *

(4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, * * *."

Although acknowledging that North Carolina law, designated as controlling in the agreement, recognizes the validity of such

an indemnification provision,[2] the district judge concluded that the effect of the provision was to relieve the lessee from responsibility for damages to third parties and, accordingly, it was "violative of the spirit and letter" of the federal regulation and therefore unenforceable.

In all deference, we think the district court misread the lease agreement for there is nothing in it which purports to relieve Carolina from any responsibility to third parties for damages resulting from the operation of the leased equipment. On the contrary, the agreement specifically provides that Carolina was taking exclusive possession and control of the equipment and assuming "complete responsibility in respect thereto." Recognizing the regulatory obligations, the instrument states that the equipment should be under "the control of the LESSEE as required by the rules and regulations of the Interstate Commerce Commission" for the purpose of safety to the public.

Nor do we find the indemnification provision violative of either the spirit or letter of the I.C.C. regulation. "The use of non-owned equipment by authorized carriers is not illegal, either under the Act or the rules under consideration," American Trucking Assns. v. United States, 344 U.S. 298, 303, 73 S.Ct. 307, 311, 97 L.Ed. 337 (1953), and the right of a carrier to augment its equipment by a lease arrangement such as we have before us is specifically authorized by statute, 49 U.S.C. § 304 (e), and the regulations, 49 C.F.R. 1057.1-1057.6.[3] While such lease arrangements must, of course, be in bona fide compliance with the regulations, which were promulgated primarily

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[2] S & N Freight Line, Inc. v. Bundy Truck Lines, Inc., 3 N.C. App. 1, 164 S.E.2d 89 (1968); Newsome v. Surratt, 237 N.C. 297, 74 S.E.2d 732 (1953).

[3] The operation of equipment incident to such a lease by a person other than a regular employee of the lessee is recognized and countenanced by 49 C.F.R. 1057.4(e).

for the protection of the public, we agree with the Fifth Circuit there is nothing in the language of the regulations "which would prohibit two freely contracting parties from determining, as between themselves, which party will ultimately bear the costs of damages done to a third person." Allstate Insurance Co. v. Alterman Transport Lines, Inc., 465 F.2d 710, 713 (5 Cir. 1972).

In granting defendant's motion, the court below placed primary reliance on the case of Alford v. Major, 470 F.2d 132 (7 Cir. 1972). We, however, do not find *Major* persuasive for the reason, among others, that the lessee in that case conceded a prima facie violation of the regulation in that the lessor had, in fact, retained full custody and control over the truck and driver during the term of the lease. Nor is the conclusion we reach discordant with our decision in Carriers Insurance Exchange v. Truck Insurance Exchange, 310 F.2d 653 (4 Cir. 1962), where at trial there was abundant evidence that the parties "used the written lease to give the appearance of compliance with the law while actually ignoring it, * * *." The basis of that decision was succinctly stated:

> "In short, the parties deliberately entered into a transaction in violation of the law and of the regulations which had been promulgated to insure the safe transportation of a dangerous substance for the protection of the general public." P. 657.

Since there is nothing in the indemnification provision facially violative of the Commission's regulations, it was error to grant defendant's motion for judgment on the pleadings. The judgment of the district court is reversed and the case remanded for further proceedings consistent herewith.

Reversed and remanded.